

RECEIVED

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

AUG 21 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 95-88
Table of Allotments,)	RM-8641
FM Broadcast Stations)	RM-8688
(Rose Hill, Trenton, Aurora, and)	RM-8689
Ocracoke, North Carolina))	

TO: The Commission

APPLICATION FOR REVIEW

Conner Media Corporation ("CMC"), the licensee of WBSY(FM), Channel 224A, Rose Hill, NC, by its attorneys and pursuant to Section 1.115 of the Commission's Rules, hereby requests Commission review of the Memorandum Opinion and Order ("MO&O"), DA 00-1312 (released June 16, 2000), 65 FR 44986 (published July 20, 2000), issued by the Chief, Allocations Branch, Mass Media Bureau (the "Bureau"), in the above-captioned proceeding. The MO&O denied CMC's request for reconsideration of the Bureau's Report and Order, 11 FCC Rcd 21223 (Chief, Alloc. Br., 1996) ("R&O"), which denied CMC's proposal to reallocate Channel 284 from Rose Hill to Trenton, NC as a Class C2 allotment, and instead granted the counterproposal of Aurora Broadcasters ("AB") to allocate Channel 283A to Aurora, NC.

In support hereof, the following is respectfully shown:

I. STATEMENT OF THE CASE

On April 26, 1995, the then-licensee of WBSY¹ filed a petition ("Petition") to amend the FM Table to reallocate Channel 284A from Rose Hill to Trenton, NC, upgrade the allotment to

¹ CMC acquired the station on August 1, 1996, pursuant to FCC consent under File No. BALH-960412GR. For purposes of clarity, the proponent of the Trenton proposal will be referred to herein as "CMC."

No. of Copies rec'd 6 + 4
List A B C D E

Class C2, and modify the WBSY license accordingly (“Trenton Proposal”). By a Notice of Proposed Rule Making², August 10, 1995 was established as the deadline for comments and counterproposals. On the August 10, 1995 counterproposal deadline, a new party, Aurora Broadcasters (“AB”) introduced a counterproposal for Channel 283A at Aurora, NC (“Aurora Counterproposal”). An FCC Public Notice³ released August 21, 1995 (hereinafter referred to as the “Aurora Counterproposal Public Notice”) listed the Aurora Counterproposal and established September 5, 1995⁴ as the deadline for replies. CMC timely replied to the Aurora Counterproposal on August 25, 1995. Among other things, CMC proposed an alternative channel allotment for Aurora, on Channel 221A in lieu of Channel 283A (“Aurora Alternate Proposal”), so that both Aurora and Trenton could receive allotments.⁵

The R&O rejected CMC’s Aurora Alternate Proposal, in pertinent part, on the ground that it was blocked by a construction permit for one-step upgrade of unbuilt station WAHL, Channel 225A, Ocracoke, NC, to Channel 224C1 (“the Ocracoke Permit”).⁶ The R&O instead allotted Channel 283A to Aurora based on a small population difference between Aurora and

²10 FCC Rcd 6611 (Chief, Alloc. Br., 1995).

³ Report No. 2092, Mimeo No. 55394.

⁴ The Public Notice announcing the Aurora Counterproposal stated, in pertinent part:

*Reply comments to this counterproposal should be submitted in this docket no later than 15 days (rather than within 30 days) after the date of this Public Notice.

September 5, 1995 was the fifteenth day following the August 21, 1995 Public Notice.

⁵ Reply of Duplin County Broadcasters To Counterproposal, filed September 5, 1995 (“Reply”), at pages 5-7.

⁶ File No. BMPH-950728IC.

Trenton. CMC timely filed a reconsideration petition showing, in pertinent part⁷, that the Ocracoke Permit contained numerous rule violations, including failure to provide the minimum principal city coverage to Ocracoke required under Section 73.315 of the Commission's rules⁸, or demonstrate an allotment site from which 70 dBu coverage of Ocracoke could be achieved⁹. CMC subsequently supplemented its reconsideration petition¹⁰ to report that the Bureau had cancelled the Ocracoke Permit.¹¹

The MO&O nevertheless held that (1) even though the Ocracoke Permit had been cancelled, the Aurora Alternate Proposal remains short-spaced to the outstanding reference coordinates for Channel 224C1 at Ocracoke; and (2) even if the Ocracoke Channel 224C1 allotment is technically defective, it could not be deleted in the instant proceeding, because the new community of Ocracoke was introduced to the proceeding after the counterproposal deadline.¹² The MO&O relied upon three Bureau decisions¹³ in which alternate channel

⁷ Petition For Reconsideration, filed January 17, 1997, at pages 5-12.

⁸ Rule Section 73.315 requires a applicants (including one-step upgrade applicants) to select a transmitter site from which a 70 dBu signal can be placed over the entire principal community. CMC also noted, at note 3 of its Petition, that the Ocracoke upgrade applicant erroneously calculated the height above average terrain of its proposed facility, thus exaggerating the predicted coverage.

⁹ See Petition For Reconsideration, supra at n.4.

¹⁰ Supplement To Petition For Reconsideration, filed July 3, 1997.

¹¹ Letter to Vincent J. Curtis, Jr., Esquire, Ref. 1800B3-DK, dated June 27, 1997.

¹² MO&O at para.10. In addition, the MO&O erroneously maintained that a Further Notice of Proposed Rule Making would be required for an NCE FM channel change at New Bern, NC, which the NCE applicant had previously agreed upon to accommodate the Aurora Alternate Proposal. However, non-commercial FM allotments are not subject to the FM Table, and can be changed by application.

¹³ Bainbridge, GA, 12 FCC Rcd 13399, n. 1 (Alloc. Br. 1997), recon. denied, 13 FCC Rcd 6424

proposals were not considered where a new, intermediate community (“Intermediate Community”) would be introduced to the proceeding after the counterproposal deadline (hereinafter referred to as the “Post Counterproposal Intermediate Community Policy”). The MO&O stated that the reason for the Post Counterproposal Intermediate Community Policy is that “considering new communities after the counterproposal deadline would require the issuance of a Further Notice of Proposed Rule Making regarding the new communities.”¹⁴

II. QUESTION PRESENTED FOR REVIEW

Whether the Bureau’s Post Counterproposal Intermediate Community Policy should be overturned or revised as inconsistent with the public interest where the Intermediate Community allotment is vacant and defective.

III. GROUND FOR REVIEW

The Bureau’s Post Counterproposal Intermediate Community Policy is inconsistent with the public interest and should be overturned or revised where the Intermediate Community allotment is vacant and defective, because a defective allotment should not be entitled to protection vis-à-vis the assignment of a new, valid allotment.

IV. THE POST COUNTERPROPOSAL INTERMEDIATE COMMUNITY POLICY DISSERVES THE PUBLIC INTEREST WHERE THE INTERMEDIATE COMMUNITY ALLOTMENT IS VACANT AND DEFECTIVE.

It is well established that, when presented with conflicting allotment proposals, the Commission will attempt to identify alternate channels in order to accommodate the conflicting

(..continued)

(Policy and Rules Div., 1998); Corpus Christi and Three Rivers, TX, 8 FCC Rcd 1375 (Alloc. Br., 1993), recon. denied, 11 FCC Rcd 517 (Policy and Rules Div., 1996); and Ashland, California, Rolla, and Monroe City, MO, 8 FCC Rcd 1799 (Alloc. Br., 1993).

¹⁴ Id.

proposals (hereinafter referred to as the Alternate Channel Policy”).¹⁵ The Alternate Channel Policy best serves the public interest, because both communities can thereby be accorded new allotments.

Upon AB’s submission of the Aurora Counterproposal on the August 10 counterproposal deadline, CMC endeavored to identify an alternative allotment suitable for either Aurora or Trenton, so that both communities could receive an allotment. CMC timely proffered the Aurora Alternate Proposal prior to the close of the September 5 reply deadline set forth in the Aurora Counterproposal Public Notice.

Notwithstanding that CMC proffered the Aurora Alternate Proposal prior to the established reply deadline, the MO&O would bar CMC’s Aurora Alternate Proposal on the basis that the proposed alternate channel would also require consideration of the allotment for Channel 224C1 at Ocrocoke, which had not previously been in the proceeding, and the counterproposal deadline had passed. However, it would have been impossible for CMC to have proposed an alternate channel allotment for Aurora (and the attendant Intermediate Community change at Ocracoke) prior to the counterproposal deadline, because AB only first proffered its Aurora Counterproposal on the counterproposal deadline. Prior to AB’s submission of the Aurora Counterproposal on the counterproposal deadline, CMC could not have predicted the need to locate an alternate channel allotment at Aurora, or that a change to an allotment for an Intermediate Community would be necessitated to implement the allotment on the alternate channel.

¹⁵ See e.g. Willcox, AZ and Lordsburg, MN, 11 FCC Rcd 22257 (Chief, Alloc. Br.), and Rapid

As noted above, the MO&O stated that the purpose of the Post Counterproposal Intermediate Channel Policy is to ensure notice and an opportunity to comment on changes to the Intermediate Community allotment. However, in the instant case, notice and an opportunity to comment would not have served any purpose. The Ocracoke allotment has been shown to be defective. The Bureau has previously acknowledged that:

...there is no reason to protect a defective proposal, and thus no deprivation of rights as to its consideration.¹⁶

Rather, it is Commission policy to delete substandard allotments, to preserve the integrity of the allotment table.¹⁷ In the instant case, the Bureau should have deleted the defective Ocracoke allotment in order to make the proposed valid allotments to both Trenton and Aurora.¹⁸

For example, in Terrell Hills, TX,¹⁹ the Commission deleted a vacant short-spaced allotment, on its own motion and without instituting a separate rule making proceeding for notice and comment, on the basis that because the allotment was defective, a rule making proceeding was unnecessary and would serve no public interest purpose. Terrell Hills remains good law, even though in that case a fully-spaced site was subsequently shown, upon which the Commission rescinded the deletion of the allotment. The Commission subsequently reiterated:

(..continued)

City and Lead, SD, 10 FCC Rcd 7715 (Chief, Alloc. Br. 1995).

¹⁶ Corpus Christi and Three Rivers, TX, *supra*.

¹⁷ See Pinckneyville, Illinois, 41 RR 2d 69 (1977); and Jacksonville, Pine Knoll Shores, and Harkers Island, North Carolina, 10 FCC Rcd 13159 (Policy and Rules Div., 1995).

¹⁹ 23 RR 2d 1733 (1972).

It is our established practice to remove existing vacant FM allotments that do not meet the minimum mileage separation requirements when the opportunity arises. Plainly, “[t]hese channels are inefficient . . . , and the public interest and our [allotment] objectives are best served, in our judgment, by deleting such allotments.”²⁰

Likewise, in the instant case, no purpose would be served by a notice and comment proceeding to delete the defective Ocracoke allotment. Indeed, prior to the Commission’s adoption of the one-step rulemaking process, the Bureau conducted a formal rule making proceeding and rejected the very same Ocracoke permittee’s identical proposal to substitute Channel 224C1 for Channel 225A!²¹ To insist upon another rule making proceeding to again consider the deficient Ocracoke proposal would be duplicative and a waste of the Bureau’s resources.

The cases the MO&O relied on to support the Post Counterproposal Intermediate Community Policy are inapposite. The Bainbridge, GA case involved a channel substitution for an existing station in the Intermediate Community. The Ashland, California, Rolla and Monroe, Mo and Corpus Christi and Three Rivers, TX cases involved vacant, but valid allotments in the Intermediate Communities. In contradistinction, the Ocracoke allotment is vacant and defective. Neither listeners nor potential future applicants will be prejudiced by deletion of the Ocracoke allotment, because it cannot be implemented consistent with the Commission’s rules in any event.

²⁰ John M. Salov, 8 FCC Rcd 172, n. 4 (1993), citing Terrell Hills.

²¹ Ocracoke, Edenton, Columbia, Pine Knoll Shores, North Carolina, 9 FCC Rcd 2011 (Acting Chief, Alloc. Br. 1994).

IV. ACTION REQUESTED AND RELIEF SOUGHT

We respectfully submit that on review, the Bureau's action rejecting the Aurora Alternate Channel proposal based on the Post Counterproposal Interim Community Policy be set aside. The policy should be clarified so that in the narrow circumstances of post-counterproposal timely introduction of an alternate channel that would implicate a defective allotment at an Intermediate Community, the alternate channel proposal may be acted upon without institution of a separate rule making proceeding. On this basis, we further request that the allotment for Aurora be modified from Channel 283A to Channel 221A, and that the proposal to reallocate Channel 224A, Rose Hill, to Trenton as a Class C2 allotment, and to amend the license for WBSY accordingly, be GRANTED.

Respectfully submitted,

CONNER MEDIA CORPORATION

By *Ellen Mandell Edmundson*

Peter Gutmann

Ellen Mandell Edmundson

Its Attorney


Pepper & Corazzini, L.L.P.
1776 K Street, NW, 200
Washington, DC 20006
(202) 296-0600
August 21, 2000

CERTIFICATE OF SERVICE

I hereby certify that I am a secretary at Pepper & Corazzini and I forwarded a copy of the foregoing document by hand delivery on August 21, 2000 to the following:

Wray A. Fitch III
Gammon & Grange
8280 Greensboro Drive, 7th Floor
McLean, VA 22102-3807

Gary S. Smithwick, Esquire
Smithwick & Belendiuk, P.C.
5028 Wisconsin Avenue, NW
Washington, DC 20016


Regina S. McFadden